IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972

No. 72-370

ARNOLD MARCUS, MARCUS DECORATING CO. INC.,
JERRY JEROME, JERED CONTRACTING CORP.
and NATHAN WHEATMAN,

Petitioners,

v.

STATE OF NEW YORK,

Respondent.

PETITION FOR REHEARING OF DENIAL OF CERTIORARI

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners respectfully request rehearing of this Court's denial on November 20, 1972 of their petition for a writ of certiorari to the New York Court of Appeals. The

ground of the application is that by its denial of certiorari this Court has left standing a decision of the highest court of the State of New York which is in conflict with a very recent decision of the highest court of the State of North Carolina on the issue of the extent of the showing necessary to be made to "implicate" the premises to be searched.

ARGUMENT

The Supreme Court of the State of North Carolina in *State v. Campbell* — N.C. — , 12 Criminal Law Reporter 2162, which was reported in the issue of November 22, 1972, subsequent to this Court's denial of certiorari in the instant case, invalidated a search and seizure based on the failure of the affidavit for the warrant to show a reasonable basis for concluding that the narcotics were in the premises to be searched.

The affidavit in that case alleged that there were arrest warrants outstanding for the suspects, that the suspects were known on reliable information to be possessors and sellers of narcotics and that the suspects resided in a certain premises, the premises for which the search warrant was sought.

In invalidating the warrant, the Court found that there was no probable cause to believe that the narcotics would be in the suspects' house:

> "The affidavit in this case is fatally defective. It details no underlying facts and circumstances from which the issuing officer could find that probable cause existed to search the premises described. The affidavit implicates those premises solely as a conslusion of the affiant. Nowhere in the affidavit is there any statement that narcotic drugs were ever possessed or sold in or about the dwelling to be

searched. Nowhere in the affidavit are any underlying circumstances detailed from which the magistrate could reasonably conclude that the proposed search would reveal the presence of illegal drugs in the dwelling. The inference the State seeks to draw from the contents of this affidavit – that narcotic drugs are illegally possessed on the described premises – does not reasonably arise from the facts alleged. Therefore, nothing in the foregoing affidavit affords a reasonable basis upon which the issuing magistrate could conclude that any illegal possession or sale of narcotic drugs had occurred, or was ocurring, on the premises to be searched."

The Court then went on to say what is particularly applicable here:

"Nowhere has either this Court or the United States Supreme Court approved an affidavit for the issuance of a search warrant that failed to implicate the premises to be searched."

The case at bar is in conflict with the foregoing because there was nothing in the Phillips affidavit from which it could be reasonably inferred that the records sought would be in the premises to be searched.

The Phillips affidavit (Petition, pp 4-8) after recounting the fact that the alleged conspiracy had been the subject of investigation before Grand Juries for two months and that all the suspected contractors had been called before the Grand Jury – which certainly suggests, in the absence, as here, of any showing to the contrary, that the conspiracy had come to an end – goes on to detail the means whereby the illicit information had been obtained and passed on, and then concludes with:

"That based upon the foregoing reliable information and upon my personal knowledge there is probable cause to believe that the estimate information has been wrongfully obtained from the Housing Authority, that it has been utilized by the parties to the agreement to submit false bids to the Housing Authority and that copies of the estimate information may be found in the files of each of the parties to the corrupt agreement at the addresses set forth above."

While the information in the affidavit supports the affiant's statements that there is probable cause to believe that the estimate information had been wrongfully obtained and that it had been utilized by the suspects to submit false bids, there is nothing whatsoever to support probable cause to believe "that copies of the estimate forms may be found in the files of each of the parties to the corrupt agreement at the addresses set forth above".

In sustaining the affidavit against the contention that the premises of the fourteen contractors as to whom warrants were sought were not sufficiently "implicated" to justify the issuance of the warrants, the New York Court of Appeals overlooked the reasonable inference that with notice of the Grand Jury investigation the conspiracy must have ceased. The court said (App. to Petition, pp. A26-A27):

"The defendants contend, however, that the affidavit is defective in that it fails to furnish the requisite "substantial basis" – demanded by the cases (*see Jones v. United States*, 362 U.S. 257, 271; see, also, *Aguilar v. Texas*, 378 U.S. 108, 114, *supra*) – for concluding that the material sought, i.e., the bid estimate forms, would "probably" be found in the offices of the contractor firms named in the affidavit. The argument is without merit. Since the bid estimate information was essential to the preparation of the false bids and the carrying on of the

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conspiracy, it was entirely reasonable to conclude that the forms would be in the offices of the conspirators."

This was erroneous because in the absence as here of any showing that the illicit data was retained in their files by any of the fourteen suspects, any motion that the incriminating papers would be kept on hand after the conspiracy must necessarily have ended was the wildest of assumptions.

By letting stand the unfortunate decision of the New York Court of Appeals, this Court has permitted a grave weakening of the safeguards of the Fourth Amendment. The New York Court of Appeals ruling should be brought into harmony with the ruling in *Campbell, supra* – indistinguishable in its essential fact situation from the case at bar and with the decisions of this Court cited therein.

CONCLUSION

This Petition for Rehearing should be granted.

Respectfully submitted,

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ND CLOSE IN CENTER

CERTIFICATE OF COUNSEL

Frederick H. Block, one of the attorneys of record for the petitioners, hereby certifies that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that the Petition is restricted to grounds confined to intervening circumstances of substantial and controlling effect.

Frederick H. Block